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Prepared Statement of Senator Chuck Grassley of Iowa  
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“The Due Process Guarantee Act: Banning Indefinite Detention of Americans”  
Wednesday February 29, 2012

Mr. Chairman, thank you for holding today’s hearing. This hearing continues a lengthy debate that occurred this past December as Congress passed the National Defense Authorization Act for Fiscal 2012. Specifically, we’ll focus on the provisions related to the procedures for capturing, detaining, and adjudicating al-Qaeda terrorists and other persons associated with al-Qaeda.

These provisions have reopened an ongoing debate about the role, and powers of the President, Congress, and the Courts in protecting national security. This debate has been ongoing since the founding of the nation, but more recently since the terrorist attacks of 9/11. Whichever point of view one takes, this topic is bound to raise concerns from those on the other side of the issue. So, an open and transparent debate is warranted.

We can agree that all branches of the government believe that American citizens should be afforded due process of law. And the express language of the National Defense Authorization Act, which includes the Feinstein Amendment, means that U.S. citizens are expressly outside the scope of the National Defense Authorization Act’s mandatory military detention provisions. And only twice has the President chosen to put a citizen in military detention; both times, at the end of the day, those individuals were transferred to civilian custody and charged with federal crimes. However, for arguments sake, even if the President were to try to indefinitely detain an American citizen under military authority, that decision could be immediately challenged via writ of habeas corpus in the federal courts as outlined by Supreme Court precedent.

I would also note that late last night, President Obama issued the procedures implementing the mandatory military detention provision of the National Defense Authorization Act. These procedures make clear that the National Defense Authorization Act expressly exempts U.S. citizens from mandatory military detention, but they also make it so procedurally difficult that effectively, no individual of any nationality will likely ever be transferred to mandatory military custody under section 1022. Between the bureaucratic requirements and the seven national security waivers, it is clear the provision will be seldom, if ever used on anyone, let alone a U.S. citizen.

Much of the precedent on this matter dates back to a World War II case concerning a U.S. citizen who was among eight Nazi soldiers that landed on a beach in New Jersey with the goal of sabotaging American interests. These individuals, including the American citizen, were tried by President Roosevelt’s administration in a military commission and sentenced to death.

On appeal to the Supreme Court, the court held that enemy belligerents, including the American citizen, were tried in the proper venue, a military commission, and upheld the sentence.

In 2004, the Supreme Court—by a vote of 6-3—found that an American citizen named Hamdi captured on the battlefield in Afghanistan and detained in the U.S. had a right to petition for a writ of habeas corpus to challenge his detention. But, a plurality of the court, in opinion by Justice O'Connor, also held that the President had the authority to detain Hamdi because Congress had passed an Authorization for Use of Military Force following the 9/11 attacks.

And, the *Hamdi* plurality recognized that detention for the duration of the conflict was part of the “longstanding law-of-war principles.” Justice O'Connor’s opinion also made no distinction based on an individual’s citizenship finding that “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”

Two more recent lower court cases, *Padilla* and *al-Marri* have added to the law regarding when a citizen or legal permanent resident can be detained, but neither case has reached the Supreme Court on the merits. But in *Hamdi* and *Padilla*, the Supreme Court said that an American citizen in military custody in the United States has a right to challenge his detention via writ of habeas corpus. This begs the question, why is this legislation even necessary?

And, there are two extremely serious practical questions for us to discuss. First, what would be the state of the law on detention of American citizens and lawful permanent residents—even if captured abroad on a foreign battlefield—if this bill became law? And, second, would passage of this bill increase the chances that this country would be victimized by another terrorist attack?

Justice Jackson, who dissented in *Korematsu*, because the military sought “to make an otherwise innocent act a crime” for racial reasons, developed a famous analysis of presidential power in the Youngstown steel seizure case. “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” After the Authorization for Use of Military Force and *Hamdi*, it is clear that President Bush and President Obama have been able to pursue terrorists under this first and highest level of presidential power, namely in concert with Congress.

Were Congress to require congressional action beyond the Authorization for Use of Military Force that the Supreme Court has already said authorizes detention of American citizens in America, the President would immediately be able to detain Americans only under the second category of presidential power that Justice Jackson outlined.

Under this bill, we would be, as Justice Jackson put it, in a twilight zone of uncertainty as to the scope of presidential power. That raises enormous practical questions, especially since the withdrawal of affirmative congressional authorization would be retroactive. And in any future conflict, if Congress remains silent, we would fight a war with the scope of presidential power to detain citizens uncertain, with the result dependent “on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.”

A second practical question flows from the first. We have been very fortunate since September 11 not to have had any major terrorist attacks on American soil, although there were some close calls. The ability of the President to use the powers Congress has given him, with appropriate oversight, in addition to Congress' own powers, has been responsible for this excellent outcome. Were we to take one of the President's clear powers and banish it to the twilight zone, it is not clear that the President will be able to continue to take the necessary actions that have prevented subsequent terrorist attacks. We should exercise exceptional caution before taking such a step.

Unfortunately, we do not have a representative of the Administration present today to discuss these important issues. I made a request to the Justice Department offering them an opportunity to testify at today's hearing, but they were unable to accommodate. This bill presents serious constitutional separation of powers issues and it would be in our best interest to hear directly from the Administration—especially in light of the fact that President Obama issued a signing statement on the provisions we're discussing. At the least, we need to hear the views of the Departments of Justice, Defense, and State regarding the impact this may have prior to voting on this proposal.

Additionally, it is of interest to me that we are debating detention of American citizens, yet—according to media reports this past fall—the Administration has issued a secret memorandum authorizing the targeted killing of American citizens abroad. Both the Chairman and I have sent letters to the Attorney General seeking a copy of that memorandum. To date, the Justice Department has not responded. At the least, we should know what the Administration's legal argument is that justifies the targeted killing of an American, and what limits apply to that authorization.

I also want to note that, unfortunately, the majority did not even inform us until Monday afternoon that the hearing would include a panel of Congressmen. This issue is too important not to hear the opposing view, so I look forward to the testimony from all of the witnesses. Thank you.